In the Supreme Court of the Hawaiian Islands—In Banco. October Term, 1888.

THE KING vs. KAHELE.

BEFORE JUDD C. J., M'CULLY J., PRESTON J., BICKERTON J., DOLE J.

Opinion of the Court per Judd, C. J.

The Attorney-General moves to quash the array or panel of jurors for the term on the ground that the Act approved on the 26th day of August, 1888, devolved the duty of selecting the list of fifty persons to serve as jurors, and from which the panel is drawn (theretofore performed by the Governor in concert with a Judge of a Court of Record) upon the "Chief Clerk of the Supreme Court." The Clerk of the Supreme Court was absent from the Kingdom on the 8th September last, the date when the list was, by law, to be made up, and this work was done by the Deputy Clerk, who signed himself "Henry Smith, Deputy Clerk, acting Chief Clerk in the absence of William Foster, Esq."

The Act of 29 August, 1884, (Chapter XLII. of the Session Laws of that year), enacted that the Deputy Clerk and the second Deputy Clerk shall have "all other powers and duties pertaining to the office of the Clerk of the Supreme Court, or necessary for the transaction of the business of said Court, subject to the direction of the Clerk of the Supreme Court and the approval of the Justices thereof." Under this statute the two Deputy Clerks can perform any duty which the law imposes upon the Clerk, concurrently with the Clerk. But the Act of 1888, in distinguishing the Clerk who is to perform the duty of selecting the list of jurors as the Chief Clerk indicates that the Legislature did not intend that this function should be executed by the other clerks concurrently with the Clerk. This being inconsistent with the Act of 1884, is a repeal of it to this extent. But the Civil Code, Section 867, prescribes that in case of the absence or death of the Clerk, his deputy shall act as Clerk, etc. It was not necessary to re-enact this provision of law in the Act of 1888, for it was not repealed by the Act of 1884, although it was made unnecessary, for if the deputies can perform any duty which devolves upon the Clerk, when he is present, they can perform these duties when he is absent.

But although the use of the title, "Chief Clerk," indicates that he and not his deputies is to perform this particular duty when a clerk is in commission and present for duty, it is too violent an assumption to say that the Legislature did not have in view the very necessary statute of long standing, which contemplated the probable contingencies of death or absence of this important officer, and provided for them by designating the person by whom these duties could by performed if such contingencies should arise.

If the Legislature intended that only the Clerk of the Supreme Court and not the Deputy Clerks, in case of his death, or absence, from whatever cause, could legally discharge the duty of preparing the list of jurors, it could have expressed this intention in words admitting of no doubt. But it has not done so.

No statute other than that of 1888 names the Clerk as the "Chief" Clerk. This statute, however, does, and we are bound to give effect to every word of a statute if it is possible so to do. We give force and effect to the word "Chief" by the interpretation thus put upon it.

The list of jurors under consideration having been prepared by the Deputy Clerk, in the absence of the Clerk, in concert with a Justice of a Court of Record, it is according to law and

The motion is overruled.

Attorney General Ashford for the Crown; Messrs. Hartwell, Smith and Brown *per contra*.

Honolulu, Oct. 8, 1888.

CONCURRING OPINION OF MR. JUSTICE M'CULLY.

It must be considered that the phrase "the Chief Clerk of the Supreme Court," designates the officer who is elsewhere in the statutes named the Clerk of the Supreme Court. This office was established and the duties of the officer prescribed by Article XXXIV. of the Civil Code, "Of the Clerk of the the Supreme Court," including Sections 859 to 869, Compiled Laws, page 245. Section 865 provides that "if necessary the Justices may employ a Deputy Clerk to assist said Clerk in keeping up his records and in the discharge of his other duties," and Section 867 provides that "in case of the absence or death of the Clerk his deputy shall act as Clerk."

In the earlier years of the Court, the Clerk requiring assistance, a person was employed on the footing above prescribed, and business increasing he was retained as a permanency. His duties were confined to attending Judges in probate and keeping probate records. He signed his name as "Assistant Clerk." He was at a later period directed to sign as "Deputy Clerk." He was appointed by the Justices of the Court and not by the Clerk, and did not sign the Clerk's name. In the course of time it grew to be the practice that he should administer oaths and perform some other duties of the Clerk without regard to the "case of absence." A few years ago a second assistant or deputy was required and was appointed and commissioned as such by the Justices, and he exercised many of the functions of a Clerk. Without intending to throw doubt upon the validity of acts done by these Deputy Clerks, it may be said that it seemed quite desirable to place their appointment and their powers upon explicit statute. Chap. XLII. of the Acts of 1884, is "An Act to provide for the appointment of a Deputy Clerk and second Deputy Clerk of the Supreme Court and to prescribe the powers and duties of said Clerks." By this Act the clerks so appointed are empowered to issue process, administer oaths, take depositions, assess damages on defaults, etc., and to have all other powers, and perform the duties pertaining to the office of the Clerk of the Supreme Court, or necessary for the transaction of the business of said Court. The exercise of these powers is not made dependent on the absence of the Clerk.

In my view the statute of 1884 supersedes the provisions relating to a deputy clerk of the Civil Code in the Sections cited above. One effect of it is to repeal the provision requiring the absence of the Clerk in order to empower the deputy to perform the Clerk's statute duties. The deputy clerks "subject to the direction of the Clerk and the approval of the Justices," as a matter of order and subordination, are legally competent at all times to execute the duties of the Clerk. It is an original power not deputed to them by the Clerk.

The statute under consideration now imposes a new duty upon the Clerk of the Court, styling him the Chief Clerk. The contention of the Attorney-General is that the use of the word Chief, limits the function to the officer who is so designated, in order that the word have some effect.

I am of opinion that the Legislature did intend to vest this power in the Clerk and not in the deputies, but in my view the intention has not been expressed in words which control, and exclude the operation of the statute of 1884. There are no words of limitation to the Clerk and prohibiting the deputies, for calling the Clerk the Chief Clerk does not exclude the deputies from any powers they possessed by a general statute, and they are therefore duly empowered to perform this duty of the Clerk.

Holding the opinion of the Court that the list was legally drawn by the first deputy, and overruling the challenge to the array, I only differ, very respectfully, in the view that the legality of the act depends upon the absence of the Clerk, and that there is any legal obligation that he alone must perform this function when he is present.

I concur in the foregoing opinion.
EDWARD PRESTON.

In the Supreme Court of the Hawaiian Islands—In Banco. July Term, 1888.

IN THE MATTER OF THE BANKRUPTCY OF G. ON CHONG. (EX PARTE, L. AHLO). ON APPEAL FROM DECISION OF DOLE, J.

BEFORE JUDD C.J., M'CULLY, PRESTON, BICKERTON AND DOLE, JJ.

Opinion of the Court by Preston J.

This was an application made to Mr. Justice Dole by L. Ahlo for payment as a preferred claim of the sum of $120, being three months' rent of the store and premises occupied by the bankrupt G. On Chong, and due at the time of his failure, and when his property was taken possession of by the Marshal.

At the hearing before Mr. Justice Dole, the claimant relied upon a decision of the Chief Justice, when First Associate Justice, "In the matter of Ching On & Co.," where His Honor allowed a similar claim.

The Chief Justice in that case followed "In re Wynne," 4 N. B. R. Rep. 23, where Chief Justice Chase of the United State Supreme Court presiding at a Circuit Court says: "Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt."

Mr. Justice Dole refused the order, on the ground that no lien existed (Hunter et al. vs. Whitfield, 89 Ill. 229. Westel vs. Mayers et al., 91 Ill. 497), and also on the ground that under the Bankruptcy Law of this Kingdom, (Section 14) the landlord's right of distress came to an end at the time of the failure, inasmuch as the bankrupt's interest in the goods then ceased.

The applicant appealed, and in his argument claimed that Section 2 of the Act to facilitate the recovery of rents (1864) gives the landlord a lien upon the chattels of the tenant, and so his claim becomes a preferred one in bankruptcy.

BY THE COURT.

The Act "to facilitate the recovery of rents" gives a landlord the right to distrain the goods and chattels of a tenant whose rent is in arrear, and Section 2 of the same Law provides "that no goods or chattels of any tenant or occupier of any lands * * * shall be liable to be taken in execution on any pretence whatever, unless the party at whose suit such execution shall be sued out shall, before the removal of such goods under such execution, pay to such landlord or owner, all such arrears of rent as shall be due to him thereanent; provided such arrears of rent do not exceed one year, if such tenancy be by the year; and in case such tenancy be by the week or month such landlord or owner shall not have any lien or claim on such goods for any arrears of rent accruing during four of such weekly or monthly terms."

This section is, for all material purposes, identical with the English Statute, 8 Anne, Chapter 14, Section 1, under which Act it has been held in the English Courts that the execution mentioned means an execution founded on a judgment, and does not include a seizure under bankruptcy proceedings.

Lee vs. Lopes, 15 East. 231.

Brandling vs. Barrington, 6 Barn. and Cress. 467.

The statute, unlike the common law, only gives the right of distress upon the goods of the tenant. And Section 14 of the Bankruptcy Act of 1884 enacts "The bankrupt shall be divested of all his title in his property from the date of his failure;" and it seems to us that the effect of this is to vest the property of the tenant in the assignee to the exclusion of the landlord's right to levy upon it.

See Morgan vs. Campbell, 22 Wall. 382.

The case "In re Wynne" was decided under the Law of the State of Virginia, which requires the officer taking goods under legal process to pay the rent in arrear. This goes further than our statute, and we may decide the case under consideration without throwing any doubt upon the authority of "In re Wynne," which, were the statutes similar, we might follow.

In arriving at the conclusion we have, we confine ourselves to our statutes, and hold that proceedings in bankruptcy and the order to the Marshal to take possession of the bankrupts' property are not an execution within the meaning of such statutes, and the Bankruptcy Law having provided for certain preferential claims, of which the landlord's is not one, he is not entiled to the lien or preference claimed, and therefore dismiss the appeal with costs.

C. Creighton for applicant; F. M. Hatch for assignees.

Honolulu, October 12, 1888.

In the Supreme Court of the Hawaiian Islands—In Banco. October Term, 1888.

THE KING vs. MAKAMAKA. FORGERY.

BEFORE JUDD C. J., M'CULLY, PRESTON, BICKERTON AND DOLE, J. J.

Opinion of the Court by BICKERTON, J.

This matter comes here on a bill of exceptions from the Fourth Judicial Circuit Court, at the August term, 1888. The first exception is to the overruling of a motion at the close of the case for the prosecution, "That the Court instruct the jury to acquit the defendant on the ground that there is not sufficient evidence to require the defendant to be put on his defence, because that there is no evidence tending to show that he knew this was a forgery."

We find that there was considerable evidence to connect defendant with the transaction, more particularly his going to the wharf and receiving the goods that were sent on the forged letter, and his conduct then, in his statement in regard to the goods being his and *vice versa*. This exception is overruled.

The next exception is to the refusal of the Court to give instruction No. 2, to the jury, viz: "To rebut the presumption of innocence through ignorance, guilty knowledge on the part of the defendant must be shown by some act or acts of the defendant." The Court held that there is no presumption of innocence through ignorance. We hold that the Court was right in refusing to give this instruction as asked for, as regards guilty knowledge on the part of defendant, the jury had the evidence of defendant, as to his acts, which clearly show guilty knowledge. This exception is overruled.

In the fourth instruction asked for, viz: "The jury must be satisfied that the defendant, Makamaka, was a principal in this forgery, in order to convict." The Court modified by adding: "But if he, being present, aided, incited, countenanced or encouraged the act of forgery, the law deems him a principal."

We hold that the Court could not have given the instruction asked for without this modification, which is from our statute.

At the close of the case the defendant, by his counsel, excepted to the verdict of the jury, as being contrary to the law and the evidence, and gave notice of motion for a new trial.

The motion for a new trial is on the ground of newly discovered evidence. And an affidavit of Makamaka, defendant, is filed in support of the motion, to the effect that he has heard since the trial of his case, that the other defendant, Paulo Puniai, (who was convicted at same trial with Makamaka), had admitted to several persons, Kalei and another, (whose name is unknown to defendant), now resident in Waimea, Kauai, that he committed the alleged forgery, that he did not let Makamaka know what he was doing, and that he has reason to believe that Makamaka did not know what he was doing. That prior to and during the trial of his said case, he was not aware that said Puniai had made such statements, that he had used due diligence to discover the same. And that he has learned since said trial that said Puniai acknowledged to persons in Nawiliwili, that he wrote said forged orders, and gave them to this deponent; further, that Puniai has admitted that he sent defendant to get the box of soap. Said admissions being since the trial of said case, etc.

This is not the affidavit or affidavits of the newly discovered witnesses, but is simply the affidavit of defendant, Makamaka, as to what he has heard. A motion for a new trial based on newly discovered evidence, should be supported by the affidavits of the witnesses themselves, whom it is proposed to produce, unless good reason is shown why same cannot be produced. The Attorney-General opposes the motion on the ground that the newly discovered evidence, coming from defendant, Puniai, would not be admissible. We certainly cannot see how this evidence could avail defendant, Makamaka, even if it was admissible, in the face of the evidence of Puniai and of defendant himself, wherein he says: "Know these letters;—Puniai wrote it in our house at Waimea, he told me to take it to Post-Office. It was addressed to Waterhouse. He told me things would come down in S. Pohaku's name. He told me to bring anything marked S. Pohuku, as it belonged to him, Puniai. I went and got the box marked S. Pohaku. Puniai told me to conceal him. I saw it (the forged letter) was signed F. Gay. I posted it. Saw Puniai write a letter and leave it (the copy found in defendant's house) and write another. He wrote the signature of F. Gay rapidly. I knew it was F. Gay's name; know that was the letter I took to Post-Office."

Puniai in his evidence denies all knowledge of the whole transaction.

We hold that the verdict of the jury must stand.

The exceptions and motion for a new trial are overruled.

A. P. Peterson, Deputy Attorney-General for the Crown; A. Rosa for defendant.

Honolulu, Oct. 12, 1888.

In the Supreme Court of the Hawaiian Islands—In Banco. October Term, 1888.

NAPAHOA (W) AND WAILELE, HER HUSBAND, VS. THE CHINESE UNION.

BEFORE JUDD, C. J., M'CULLY, PRESTON, AND DOLE, J. J.

[Mr. Justice Bickerton did not sit in the case, being interested.]

Opinion of the Court per Judd, C. J.

This is an action of Ejectment to recover possession of land on King street, Honolulu, on which stands the Club House of the "Chinese Union," Defendant Corporation.

The action was began on the 16th July, 1887, and Jury was waived at the October Term and a hearing of the case was had on March 20, 21 and 22, 1888, before Mr. Justice Preston. On the 2d April, 1888, the Justice filed his decision rendering judgment for the defendant as follows:

"This is an action of Ejectment for a piece of land comprised in Royal Patent No. 136 on Land Commission Award 936, situate on King street, Honolulu, upon which the building of the Chinese Union stands.

"The defendant The Chinese Union answered and the other defendants disclaimed.

"The patentee of the land was named Palea, and the plaintiffs claimed that Palea and Piilani, the mother of the plaintiff Napahoa, were brother and sister, and that Palea died without having issue intestate and unmarried leaving the female plaintiff his sole heir and next of kin.

"The defendants claimed that Palea was married to a woman named Puu, and died leaving her and a niece Kapahukui surviving and claimed title through them as follows:

"'Conveyance by Pun to Kapahukui.

"'Kapahukui married William H. Tell.

"'Kapahukui devised the land in question to W. H. Tell.

"'Conveyance by W. H. Tell to Victoria A. Bannister, who subsequently married W. H. Tell.

"'Conveyance by V. A. and W. H. Tell to James Love.

"'Conveyance by James Love to defendants Alee and others.

"'Conveyance by Alee and others to The Chinese Union.'

"The evidence given is entirely irreconcilable, and I am left to decide between the parties, and I take the evidence of Mrs. Charlotte Adams, who is nearly ninety years of age as establishing the right of the defendants.

"She corroborates the witnesses for the defendants, and says she knew Palea from his boyhood, and gives a statement of his relatives and their names, and seems to infer that the Palea through whom the plaintiffs claim was not the Palea the patentee of the land in question. This will account for many of the contradictions in the testimony.

"I am of opinion and find

"1st.—That Napahoa (w), the plaintiff, was not a relative of Palea the patentee.

"2d.—That Palea and Puu were lawfully married according to the ancient Hawaiian custom, previous to the proclamation respecting marriage by Kauhumanu, and thereafter continued to live together up to the time of Palea's death.

"3d.—That consequently Puu and Kapahukui were under the Statute of descents, the only heirs of Palea and entitled to the land in question as tenants in common.

"4th.—That the defendants have proved their title and I accordingly order judgment to be entered in their favor."

Plaintiffs' counsel here withdrew from the case and another attorney was substituted who filed a motion for a New Trial on the ground (1st), that the judgment was contrary to law and the evidence, and (2d), on the ground of newly discovered evidence.

The Justice on the 24th April, heard the motion and overruled the same, thereupon counsel for plaintiff was again changed and a bill of exceptions tendered to the Court by the new counsel which was finally allowed as of the 4th May.

BY THE COURT.

Upon an examination of the evidence in the case, we find that there was abundant evidence that the Palea from whom plaintiff claimed was not the Palea to whom the land was patented, and under whom defendants claim. For this reason a new trial on the ground that the judgment was contrary to the evidence is refused.

On the second ground, of newly discovered evidence, the affidavit in support is by Wailele, husband of plaintiff, who deposes that "since the trial he has discovered the evidence of one Hikaalani (w), a resident of Kailua, Oahu, which will establish the facts that the Palea alleged to be the owner of the land in question was born at Waimanalo, and not at Kailua, that he is related by blood to Napahoa [defendant's wife], that he left Waimanalo and came to Honolulu and lived upon the land in question, that said Hikaalani was born at Kailua aforesaid, and has always lived there, that she is now about sixty years of age, and that she never knew of a man by the name of Palea belonging to Kailua aforesaid, that said Hikaalani is at present at Kailua aforesaid, which is a long way from Honolulu, and the road thither is very bad and deponent is unable to procure her affidavit within the time allowed for filing a motion for new trial of this cause, but that deponent will be able to produce her at a new trial of this cause. That deponent did not, nor did Napahoa, know of the existence of said evidence at the time of the trial, and could not by the use of the utmost diligence have discovered or produced it upon the former trial."

In the case of Walker vs. Grimes, 1 Haw. Rep. 34, this Court held that "to support a motion for a new trial on the ground of newly discovered evidence, there must be an affidavit of the witness himself as to what he will testify to in order that the Court may judge of its materiality." This was affirmed in Re Will of Hewahewa, 2 Haw. Rep. 165, and the Court say that "applications like the present [for a new trial] should be accompanied by affidavits of the witnesses to the newly discovered evidence, unless good cause is shown why such affidavits have not been obtained." This rule has never been relaxed to our knowledge by any subsequent decision of this Court except that in Briggs vs. Mills, 4 Haw. Rep. 451, the Court say that "we have no doubt that the Court has the power to extend the time for filing additional affidavits in support of such a motion [for a new trial on the ground of newly discovered evidence], but the motion and bond and some affidavit must be filed within ten days after the verdict."

The excuse for not filing the affidavit of Hikaalani as set forth in Wailele's affidavit is that she resides in Kailua, say fifteen miles from Honolulu, and that she is sixty years of age. This reason might possibly be deemed good for not produing her affidavit within the ten days after the judgment, but no further time was asked within to obtain it, and though nearly six months have elapsed since then, it is not yet offered to the Court.

Counsel relied upon Wailele's affidavit as sufficient. We are obliged to hold that it was not and therefore overrule the exceptions.

A. Rosa for plaintiffs; C. Brown for defendants.

Honolulu, October 8, 1888.

Planters' Monthly.

THE FOLLOWING IS THE TABLE OF CONTENTS of the number for October:

☞ Subscriptions received by the HAWAIIAN GAZETTE CO. and the News Agents. Price $2.00 a year; foreign subscribers $3.00.

135-3t 1242-1t